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No. 07-1315

IN THE
Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,
Petitioner,

v.

Alexandre Mirzayance,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice.

SUMMARY OF ARGUMENT

This Court has never applied 28 U.S.C. §2254(d) to a summary, unexplained state court decision. While

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[1]Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

the State's brief takes for granted that §2254(d) applies in such circumstances, and invites this Court to imagine the grounds upon which the state court might have based its decision and then "defer" to that reasoning, the approach the State proposes is at odds with the language and structure of §2254 and this Court's decisions applying it.

To establish entitlement to relief, a habeas petitioner must prove both that he "is in custody in violation of the Constitution," §2254(a), and that the state court decision rejecting his claim on the merits was "contrary to, or involved an unreasonable application of, clearly established federal law," or "was based on an unreasonable determination of the facts ...," §2254(d). The §2254(a) inquiry involves traditional application of established constitutional rules to the evidentiary record. The §2254(d) inquiry, by contrast, looks to the state court's performance in adjudicating the petitioner's constitutional claim under binding federal law and in light of the available record. Giving effect to the presumption that state courts are competent adjudicators of federal rights, §2254(d) prohibits a federal court from remedying a constitutional violation merely because it disagrees with the outcome reached by the state court; instead, §2254(d) permits a remedy only where the federal court further concludes that the state court's adjudication of the claim was defective in one or more of the ways enumerated in §2254(d)(1) and (2).

Section 2254(d)'s concern with the state court's performance is evident from its sub-parts (1) and (2),

which enumerate categories of errors that can be committed by a state court adjudicating a constitutional claim, and direct the federal habeas court to examine the applications of federal law that were "involved" in the state court decision, and the factual determinations that the state court decision "was based on." This Court's decisions illustrating the proper application of §2254(d) have consistently looked not only to the result reached by the state court, but to the reasoning articulated by the state court as it selected and applied the relevant law, and determined the relevant facts.

The analyses required by the language of §2254(d) and illustrated in this Court's decisions cannot be performed in the absence of some articulation of the state court's reasoning. Lower courts that have attempted to apply §2254(d) to unreasoned state court decisions have done so only through assumption and speculation, which are neither permissible under the plain statutory language or this Court's cases, nor likely to yield accurate, reliable results.

Application of §2254(d) to unexplained state court decisions also inevitably results in insulation of state court outcomes to which the statute, by its own plain language, is inapplicable. It is not unprecedented for a state court to overlook or misapprehend a prisoner's federal claim. Without some explanation of the state court's reasoning, however, a federal court cannot know whether the state court actually "adjudicated" a particular claim or

its sub-parts "on the merits." Applying §2254(d) under these circumstances provides the individual state court with an unjustifiable windfall, and provides all state courts with a perverse incentive to say as little as possible when disposing of federal constitutional error. Neither of these results is consistent with the statutory scheme Congress enacted.

Section 2254(d) is best read such that its applicability depends not only on satisfaction of the express requirement that the state court "adjudicate[]" a federal claim "on the merits," but also the implicit requirement that the state court provide some articulation of its rationale for denying relief. Moreover, under any reading of the statute, the impracticability of applying it to an unexplained state court decision must be accounted for. This can be accomplished with a sliding scale: where the state court provides a full or partial rationale, the limitation on relief is applicable to the extent the federal court can confidently conduct the inquiries mandated by §2254(d)(1) and (2); where the state court provides no rationale, a federal court which independently finds constitutional error under §2254(a) should be permitted to draw the natural conclusion that the state court's unexplained and erroneous denial of relief was tainted by one or more of the defects enumerated in §2254(d)(1) or (2). As a further alternative, a federal court convinced that a state court has summarily rejected a meritorious constitutional claim should be authorized to grant the writ if it concludes that the state court's unexplained result deviates substantially from the result dictated by the relevant law and the

operative facts.

Finally, reading §2254(d) to apply only where the state court decision provides the federal habeas court with the information necessary to conduct the analyses dictated by the statute and illustrated in this Court's cases is consistent with states' interests in finality, comity and federalism. State courts that choose not to articulate their reasons for rejecting constitutional claims remain free to do so. And while §2254(d) is an important part of the habeas scheme, an array of other barriers to review and relief remain in place regardless of whether a state court's decision is eligible for the additional protection made available through §2254(d).

ARGUMENT

NACDL concurs fully with the arguments set forth in the Brief of Respondent, and is of the view that Mirzayance's ineffective assistance of counsel claim should prevail. Trial counsel's last-minute decision to forego presentation of Mirzayance's insanity defense was objectively unreasonable given that the defense was fully prepared, viable, and represented Mirzayance's best hope for success at trial. Additionally, in light of the strength of the evidence counsel could have presented in support of the insanity defense, there is at least a reasonable probability that, but for counsel's unreasonable decision, the result of Mirzayance's trial would have been different.

NACDL submits this brief as *amicus* not to offer

further discussion of the merits of Mirzayance's claim, but to alert the Court to a troubling subsidiary issue raised by the arguments in the Petitioner's Brief on the Merits ("Pet. Brf."). Whether or not resolution of this subsidiary issue ultimately proves necessary to the disposition of this case, *amicus* believes it is critical that the Court have a full appreciation for the scope and importance of the issue, either to properly resolve it in this case, or to ensure that it is appropriately reserved for a future case.

The ineffective assistance of counsel claim before the Court in this case was presented to the California courts in state habeas corpus proceedings. The California Supreme Court, which was the last state court to rule on Mirzayance's claim, disposed of it summarily, and without the evidentiary hearing Mirzayance had requested, in an order stating as follows: "Petition for writ of habeas corpus DENIED." Pet. App. 206. The California Court of Appeal had earlier rejected Mirzayance's claim without explanation. Pet. App. 203 ("In a petition for writ of habeas corpus ... defendant additionally contends ... [he] was denied effective assistance of counsel. We ... deny the petition.").

This Court has never decided a case involving the combination of a summary state court disposition and 28 U.S.C. §2254(d). In its brief, the State proceeds on the assumption that §2254(d)'s limitation on the availability of federal habeas relief applies with full force to the California court's summary decision. Operating under this assumption, the State repeatedly

invites the Court to (a) hypothesize grounds and rationales for the state court decision, and then (b) "defer" to this hypothetical state court decision in the name of §2254(d).[2] This Court, however, has never endorsed such speculation-driven use of §2254(d). As discussed in the sections that follow, the combination of a summary state court decision and §2254(d) poses an array of serious problems[3] – problems of statutory

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[2]*See, e.g.*, Pet. Brf. at 20-21 (asserting that California Supreme Court could have reasonably denied relief on either deficient performance or prejudice grounds); *id.* at 29 (quoting *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007)) ("the dispositive inquiry under §2254(d) is whether a state-court decision can be 'reconciled with any reasonable application of the controlling standard' set forth in [sic] by this Court"); *id.* at 36 ("[I]t would not be unreasonable for a state court to conclude that Mirzayance had failed to establish either one or both of the two requisite prongs ... of a constitutional claim under *Strickland*"); *id.* at 37 ("Relief is unavailable under §2254(d)(1) because the state-court adjudication ... was at least 'reasonable' under *Strickland* in light of his unpersuasive showing of 'prejudice'"); *id.* at 39 ("[I]t would not be 'objectively unreasonable' to conclude under *Strickland* that Mirzayance had failed to establish a 'reasonable probability' that the jury would have found he could not appreciate the wrongfulness of his actions"); *id.* at 43 (state court record of trial counsel's investigative efforts "satisfies a proper competence inquiry under *Strickland*, and validates the 'reasonableness' of the state court adjudication"); *id.* at 44 (citing *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Carey v. Musladin*, 127 S.Ct. 649, 654 (2006)) ("Even if the California Supreme Court's decision was somehow *incorrect*, it cannot fairly be labeled as 'objectively unreasonable' when viewed with the requisite 'double deference'").

[3]The difficulties raised by the prospect of applying §2254(d) to summary state court decisions have been recognized by the courts of appeals. *See, e.g.*, *Himes v. Thompson*, 336 F.3d 848, 853

construction, statutory application, and habeas policy – which the State's brief neither acknowledges nor attempts to resolve.[4]

(9th Cir. 2003); *Washington v. Schriver*, 255 F.3d 45, 53 (2nd Cir. 2001); *Hurtado v. Tucker*, 245 F.3d 7, 18 n.18 (1st Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000) (*en banc*).

[4]Although not the subject of this brief, significant problems can also arise when a federal court attempts to apply §2254(d) after holding an evidentiary hearing. As discussed *infra*, §2254(d) focuses on the state court's adjudication of a constitutional claim using the facts and law that were before the state court. This framework functions well when the factual record before the federal court is the same as the record utilized by the state court. But when new facts are introduced in the federal proceeding, and those new facts significantly affect the analysis of the constitutional claim, §2254(d) loses its relevance. On one hand, the §2254(d) framework cannot accommodate a "claim" or "merits" materially different from those considered by the state court. *See* §2254(d)(2) (restricting analysis to "evidence presented in the state court proceeding"). And on the other hand, it would make no sense to preclude a federal court from giving full consideration to the new evidence as it resolves the petitioner's claim, particularly since that new evidence could have been accepted only after the petitioner had established both diligence in state court. *See* 28 U.S.C. §2254(e)(2); *(Michael) Williams v. Taylor*, 529 US. 420 (2000), and an entitlement to relief if his factual allegations were borne out, *see Schriro v. Landrigan*, 127 S.Ct. 1933 (2007). In short, where new evidence materially impacting the merits of a claim is accepted by a federal court, §2254(d) has no role to play with respect to the resolution of that claim. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004) (*per curiam*) ("Where new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer").

I. The post-AEDPA framework for determining rights and remedies.

A post-AEDPA habeas petitioner seeking relief on a claim previously rejected by a state court for non-procedural reasons must ordinarily establish at least two things (though not necessarily in this order, *see Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)). Pursuant to 28 U.S.C. §2254(a), the petitioner must prove that he "is in custody in violation of the Constitution or laws or treaties of the United States." *See, e.g., Dickerson v. United States*, 530 U.S. 428, 439 n.3 (2000) ("Habeas corpus proceedings are available only for claims that a person 'is in custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. §2254(a)"). Absent proof that a constitutional right has been violated, there is no need to consider the availability of a remedy, for there has been no wrong for which a remedy could be required. *See Heck v. Humphrey*, 512 U.S. 477, 499 n.4 (1994) ("a state prisoner whose constitutional attacks on his confinement have been rejected by state courts cannot be said to be unlawfully confined unless a federal habeas court declares his 'custody [to be] in violation of the Constitution or laws or treaties of the United States,' 28 U.S.C. §2254(a)").

In addition to proof of a constitutional violation under §2254(a), a habeas petitioner must show that §2254(d)'s directive that "the writ of habeas corpus ... shall not be granted" does not prohibit a remedy for his claim. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005) ("We refer here to a determination that there

exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§2254(a) and (d)"); *cf. Danforth v. Minnesota*, 128 S.Ct. 1029, 1047 (2008) (discussing distinction between recognition that a petitioner's constitutional right has been violated, and availability of the writ of habeas corpus as a remedy for that violation). A petitioner makes this showing by establishing that the state court's

> adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§2254(d).

It is well established that where both §2254(a) and §2254(d) apply, satisfaction of one but not the other is insufficient to permit relief. *See* (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("Under §2254(d)(1)'s 'unreasonable application' clause, ... a federal habeas court may not issue the writ *simply because* that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must *also* be unreasonable") (emphases added); *Fry v. Pliler*, 127

S.Ct. 2321, 2327 (2007) (§2254(d) "sets forth a precondition to the grant of habeas relief (...) not an entitlement to it").[5]

Sections 2254(a) and 2254(d) ask different questions which must be answered in different ways. The question posed by §2254(a) goes directly to the allegation that a right guaranteed to the prisoner by the Constitution was violated during the prisoner's state court proceedings. Federal courts answer that question every day by reference to the constitutional rules of criminal law and procedure this Court has recognized, *e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing standard for resolving ineffective assistance of counsel claims); *Edwards v. Arizona*, 451 U.S. 477 (1981) (establishing rule for assessing claimed violations of right to counsel); *Brady v. Maryland*, 373 U.S. 83 (1963) (establishing due process rule requiring disclosure by prosecution of

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[5]*See also, e.g.*, *Rose v. Lee*, 252 F.3d 676, 691 (4th Cir. 2001) (satisfaction of §2254(d) without proof of constitutional violation under §2254(a) does not require relief); *Aleman v. Sternes*, 320 F.3d 687, 690-691 (7th Cir. 2003) (where prisoner can satisfy §2254(d), he "still must establish an entitlement to the relief he seeks, and it is §2254(a), not §2254(d), that sets the standard: the court issues 'a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States'"); *Frantz v. Hazey*, 533 F.3d 724, 735-737 (9th Cir. 2008) (*en banc*) (recognizing and discussing independent roles for §§2254(a) and (d)).

evidence favorable to the accused).[6]

Section 2254(d) asks a second, different question, one focused not on the existence *vel non* of a constitutional violation infecting the judgment underlying the prisoner's custody, but on the state court's performance in adjudicating the prisoner's challenge to that judgment based on the alleged constitutional violation. This focus on state courts' adherence to governing federal law and adjudicatory norms serves the dual purposes of ensuring that judgments reflecting the competence state courts are presumed to possess are left alone,[7] while decisions produced by materially defective adjudications are not.

Proceeding from the presumption that state courts are generally competent adjudicators of federal rights whose judgments warrant respect, §2254(d) sets *denial* of a remedy as the default outcome in a federal habeas case ("An application for a writ of habeas corpus ... shall not be granted"). Recognizing that the presumption of state court competence does not always hold true, however, the statute further prescribes

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[6]Where appropriate, the §2254(a) question also involves an assessment of whether the constitutional violation was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[7]*See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (criticizing court of appeals' "readiness to attribute error" to state court as "inconsistent with the presumption that state courts know and follow the law"); 142 Cong. Rec . S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("There is simply no reason that federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts").

conditions under which the general prohibition against issuance of the writ can be set aside in a particular case (" shall not be granted ... unless ..."). Those conditions, set forth in subdivisions (d)(1) and (d)(2) of §2254, take the form of characteristics – analytical acts or omissions – which, when found in the "adjudication" which "resulted in" the state court's "decision," dispel the presumption that the state court competently resolved the prisoner's claim, thereby authorizing issuance of a federal remedy. Specifically, a state court decision denying relief will not be upheld against a federal court's finding of constitutional error where the adjudication that produced the state court decision: "was contrary to ... clearly established federal law," §2254(d)(1); or "involved an unreasonable application of[] clearly established federal law," §2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," §2254(d)(2).

That §2254(d) is concerned with the state court's performance in the process of adjudicating a constitutional claim is clear from its plain language. The three categories of characteristics enumerated in subparts (1) and (2) encompass the spectrum of analytical missteps and deviations from decision-making norms that a state court can commit when adjudicating a litigant's claim of constitutional error. Moreover, the second and third categories of characteristics ("involved an unreasonable application" and "was based on an unreasonable determination of the facts") both incorporate past participles ("involved" and "was based on") which explicitly direct the federal

habeas court to look not merely at the state court outcome, but at the subsidiary findings and reasoning which yielded that outcome. Thus, where a federal court is convinced that constitutional error within the meaning of §2254(a) is present, these two features of §§2254(d)(1) and (2) combine to require a careful examination of whether the state court's failure to itself recognize and remedy the error is attributable to a departure from governing law or decision-making norms, or instead to a competent determination that no error exists with which the federal court simply disagrees.

This Court's decisions illustrate the analyses that must be undertaken for each of the three categories enumerated by §§2254(d)(1) and (2). In *Williams*, the Court held that §2254(d)(1)'s "was contrary to" clause is satisfied where "the state court applies a rule that contradicts the governing law set forth in our cases," or where "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-406. In applying this construction, the Court has consistently looked to the content of the state court's decision for an express statement of the rule chosen by that court, or for other indicators from which to confidently infer that the state court's rule of decision was consistent with the governing federal principles. In *Williams* itself, the Court looked to "[t]he Virginia Supreme Court's own analysis of prejudice" and found it "contrary to" *Strickland* because it "mischaracterized at best the appropriate

rule," such that the resulting "decision turned on [the state court's] erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 529 U.S. at 397. After a similar examination of the content of the state court's decision in *Woodford v. Visciotti*, *supra*, the Court rejected the Ninth Circuit's determination that the state court's decision "was contrary to" federal law because that determination rested upon a "mischaracterization of the state court opinion, which expressed and applied the proper standard for evaluating prejudice." *Visciotti*, 537 U.S. at 22.

Section 2254(d)(1)'s "involved an unreasonable application of" clause has been construed to authorize habeas relief where "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and where "the state court either unreasonably extends a legal principle ... to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. Here again, this Court has consistently looked to and relied upon the content of the state court's opinion for signs that the court did or did not reasonably apply the governing rule. For example, in *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*), the Ninth Circuit's grant of relief on a jury coercion claim was overturned because, although the state court's opinion did not cite federal law, its reasoning indicated that the state court had applied principles at least as favorable to the petitioner

as those prescribed by federal law, and the "fair import of the [state] Court of Appeal's opinion" was that it had considered all of the relevant facts. *Early*, 537 U.S. at 8-9; *see also id.* ("Avoiding the[] pitfalls [of §2254(d)(1)] does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the *reasoning nor the result* of the state-court decision contradicts them") (second emphasis added). Similarly, in *Williams*, this Court's determination that the Virginia Supreme Court "failed to evaluate the totality of the available mitigation evidence" rested on the content of the state court's opinion. *Williams*, 529 U.S. at 397; *accord, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (Maryland Court of Appeals' decision involved an unreasonable application of *Strickland* because its reasoning showed it had "merely assumed that [trial counsel's] investigation was adequate"); *Rompilla v. Beard*, 545 U.S. 374, 388-89 (2005) (Pennsylvania state post-conviction courts' superficial review of trial counsel's investigation "fail[ed] to answer the considerations" relevant to the *Strickland* deficient performance inquiry, and was therefore "objectively unreasonable"); *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1671 (2007) (state court's "formulation of the issue" and inattention to "the fundamental principles established by [this Court's] most relevant precedents, resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'").

Additionally, although this Court has had only

one occasion to describe its application in a case, the approach to §2254(d)(2)'s "was based on an unreasonable determination of the facts" clause is the same. In *Wiggins*, the state court's opinion revealed that its rationale for denying relief included a mistaken belief that certain records available to trial counsel contained information from which counsel could have made an informed decision to limit their investigation. After recognizing that the records did not contain the information attributed to them by the state court, this Court concluded under §2254(d)(2) that the state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of [its] decision." *Wiggins*, 539 U.S. at 528.

While this Court's decisions applying §2254(d) have involved a variety of underlying constitutional claims, and have resulted in both grants and denials of relief, they all share a common characteristic: the §2254(d) analyses have always been informed in substantial part by the content of the state court decision rejecting the prisoner's claim during an earlier stage of review. As discussed below, without the information that can only be obtained from a reasoned state court decision, the approach to §2254(d) illustrated by this Court's cases cannot work.

II. Problems inherent in the application of §2254(d) to a summary state court decision.

The inquiries necessitated by the plain language of the statute cannot be made when a federal court has

only a summary state court denial with which to work. As the decisions discussed above illustrate, a federal court applying §2254(d)(1) or (2) must be able to answer an array of questions for itself. For example, to apply §2254(d)(1)'s "was contrary to" clause, a federal court must be able to ascertain the rule or legal principle selected and relied upon by the state court. A federal court applying §2254(d)(1)'s "involved an unreasonable application of" clause must know, *e.g.*, whether the state court understood the scope of the governing rule, what factors the state court considered in applying the rule, and what evidence the state court considered relevant to application of the rule. And a state court answering §2254(d)(2)'s "was based on an unreasonable determination of the facts" question must know, *e.g.*, what evidence the state court did and did not acknowledge or credit, what inferences the state court drew or failed to draw from the evidence, and the relative weight assigned to particular items or classes of evidence. All of these questions arise naturally and directly from the plain meaning of §2254(d)(1) and (2)'s three key phrases. None can be meaningfully answered by reference to a summary state court decision.

Some courts of appeals have purported to apply §2254(d) to summary state court decisions, but the analyses they have performed do not comport with the requirements of the statute. For example, some courts of appeals have held that, when confronted with a summary state court decision, the federal habeas court should assume the state court selected the correct clearly established federal law from this Court's

decisions, and then determine whether the result reached by the state court was reasonable. *See, e.g.*, *Reid v. True*, 349 F.3d 788, 799 (4th Cir. 2003); *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003). This approach has at least two serious problems.

First, there is no justification – in the statute or elsewhere – for assuming away the portion of §2254(d)(1)'s "was contrary to" clause that requires a federal court to determine whether "the state court applie[d] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405-06. To be sure, Congress did set denial of relief as the default outcome in §2254(d), but it paired that default outcome not with the sort of blind deference that assuming the accuracy of the state court's choice of law necessarily entails, but with a carefully calibrated mechanism by which a prisoner may prove that the state court outcome in his case resulted from a defective adjudication and may therefore be disturbed.

Second, any assessment of the reasonableness of an unexplained state court decision necessarily relies on a form of reverse-engineering that is inconsistent with the plain language of the statute and this Court's decisions applying it. *See, e.g.*, *Wade v. Herbert*, 391 F.3d 135, 142 (2nd Cir. 2004) ("Because the [state court] gave no explanation beyond saying that the claim was 'without merit,' we cannot know the exact basis of its reasoning. If any reasonable ground was available, we must assume the court relied on it"); *Bell v. Jarvis*, 236 F.3d 149, 168-171 (4th Cir. 2000) (*en*

banc) (assuming state court reached and resolved each component of petitioner's Sixth Amendment claim and crediting state court's rejection of claim as reasonable). A court applying §2254(d)(1) must be able to assess the application of federal law or equivalent principles that was actually "involved" in the state court's adjudication. A rationale for denying relief imagined by the federal court or counsel for the state is not an adequate substitute. Indeed, when confronted in *Wiggins* with the state's proffer of a *post hoc* rationale for the state court of appeals' decision, this Court dismissed it as having "no bearing" on the §2254(d) analysis. *Wiggins*, 539 U.S. at 529. The same holds true when a court applies §2254(d)(2). It is impossible for a federal court to know or assess the reasonableness of the factual determinations that a state court's denial of relief "was based on" without some reliable evidence of what those determinations were. If the Maryland Court of Appeals had not issued a reasoned decision in *Wiggins*, this Court would never have known that the state "court based its conclusion, in part, on a clear factual error" satisfying §2254(d)(2). *Wiggins*, 539 U.S. at 528. The defect in the state court's decision would still have existed, but it would have gone undetected.

The assumptions necessary to the application of §2254(d) to an unexplained state court decision also ensure that the statute will be applied to claims or components of claims as to which its plain language actually renders it inapplicable. On its face, §2254(d) applies only to a "claim that was adjudicated on the merits in State court proceedings." It is far from

unprecedented for a state court to misunderstand or overlook a prisoner's federal claim. When this occurs in a non-summary state court decision, federal courts have no trouble recognizing that there has been no adjudication of the federal claim by the state court, and that §2254(d) therefore does not apply. *See, e.g.*, *Sperry v. McKune*, 445 F.3d 1268, 1274-75 (10th Cir. 2006); *Harrison v. McBride*, 428 F.3d 652, 666 (7th Cir. 2005); *Chadwick v. Janecka*, 312 F.3d 597, 606 (3rd Cir. 2002); *Gruning v. DiPaolo*, 311 F.3d 69, 71 (1st Cir. 2002). When this occurs in a summary state court decision, however, application of §2254(d) results in a windfall of protection to which the state court decision, by the statute's plain terms, is not entitled.

Moreover, even if it could be assumed that the state court reached every federal claim presented by the prisoner, it could not further be assumed that the state court reached every *component* of every claim, as would be necessary to justify application of §2254(d). For example, *Strickland*, 466 U.S. at 697, expressly instructs that "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." When a state court limits its analysis as permitted by *Strickland* but fails to explain that it has done so, the federal habeas court cannot safely rely upon an assumption that the state court reached both prongs of the *Strickland* test. Given *Strickland*'s instruction, such an assumption would often be wrong, and a federal court applying §2254(d) on the basis of the assumption would be doing so in circumstances where this Court has twice

expressly found its application inappropriate.[8] *See Wiggins*, 539 U.S. at 534 ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis"); *Rompilla*, 545 U.S. at 390 ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*") (internal citation omitted).

In addition to being impractical and unfaithful to the language of the statute, sanctioning application of §2254(d) to unexplained decisions would establish a perverse incentive structure for state courts. On one hand, a state court conscientious enough to analyze a prisoner's federal claims and articulate the bases for its decision subjects its reasoning and conclusions to the scrutiny of a federal court making the inquiries prescribed by §2254(d). On the other hand, a state court which merely declares that a prisoner's claims – no matter how numerous, complex or debatable – are "denied" or "without merit" gets the benefit of every doubt, from whether the court even understood and reached each claim and its components, to whether the

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[8]The danger of over-application of §2254(d) to test components not reached by state courts is by no means confined to ineffective assistance of counsel claims governed by *Strickland*. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231 (2005) (discussing and applying three-part analysis for resolving equal protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (describing three essential components of *Brady v. Maryland* violation).

court chose the appropriate rule of decision, to whether the court reasonably applied that rule to facts reasonably found from the state court record. Such an incentive structure would at once undermine the legislative premise upon which passage of §2254(d) was made possible, *see supra* at 12 n.7, and increase the number of federal habeas cases resolved through rank speculation rather than accurate analysis.

III. Reconciling the need for a reasoned state court decision with §2254(d)'s "adjudicated on the merits" clause.

At first blush, §2254(d)'s opening lines suggest that the only prerequisite to application of the statute's limitation on granting habeas relief is a determination that the "claim ... was adjudicated on the merits in State court proceedings." If this were the only requirement, then an unexplained state court decision would, technically, come within §2254(d)'s reach. *See, e.g.*, *Sellan v. Kuhlman*, 261 F.3d 303 (2nd Cir. 2001) ("'[a]djudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground"); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000) ("In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural").

Such a narrow, technical reading of the statute's

opening lines, however, creates tension with the plain language of subparts (d)(1) and (d)(2) – particularly the mandate that a federal court assess the applications of federal law "involved" in a state court decision, and the determinations of fact the state court decision "was based on." As shown *supra*, whether such inquiries are *actually* appropriate in a given case, and if so, exactly how those inquiries should proceed, cannot be determined without some explanation of the bases for the state court's decision. This tension is avoided by recognizing that §2254(d) contains *both* an explicit requirement that a state court adjudicate a claim on the merits (as opposed to a procedural ground), and an implicit requirement that the state court decision disclose its reasoning. To the extent either of these requirements goes unmet by the state court's decision, §2254(d) should be deemed inapplicable.

Even if §2254(d) is not read to contain an implicit requirement that state courts explain their work, the impracticability of conducting the analyses required by §§2254(d)(1) and (2) on summary state court decisions must be acknowledged and accounted for. The accommodation most reconcilable with the statute would take the form of a sliding scale. Where the state court decision is partially or fully reasoned, a federal court would be obligated to credit the state court's rationales – those that appear expressly and those that can be reasonably inferred – when performing the §2254(d) analysis, just as this Court's decisions have illustrated. But where the state court decision is unreasoned, the federal court would first be obligated to independently assess the merits of the

constitutional question under §2254(a). If that independent assessment reveals a constitutional violation, the federal court would not be obliged to assume that the state court's result, though decidedly wrong, was nevertheless produced by an analysis that was consistent with or involved a reasonable application of clearly established federal law, and was based on a reasonable determination of the facts. Instead, the federal court would be permitted to draw the more natural and intuitive conclusion that a state court decision which reaches an incorrect result on an issue of federal constitutional law and does not even undertake to justify that result by articulating reasoning which attempts to come to terms with the governing law and operative facts is tainted by at least one of the defects enumerated in §2254(d)(1) and (2). The combination of constitutional error found under §2254(a) and adjudicatory defect inferred under §2254(d) would authorize issuance of the writ.

As a further alternative, the statute's basic requirement that a petitioner show both a constitutional violation and a defect in the state court's decision could be construed to require that, where a state court's unexplained result deviates from the result the federal court finds should flow from the application of clearly established federal law to the record facts, the magnitude of the deviation must be *substantial* before issuance of a remedy would be authorized under §2254(d). This alternative would represent at least a rough accommodation of the statutory aims to heighten respect for state court adjudications of the merits of constitutional issues, but

to do so only where it is clear that the state court actually undertook such an adjudication in a manner consistent with the law and the facts.

IV. Limiting application of §2254(d) to state court decisions actually susceptible to meaningful review would not undermine states' interests finality, comity and federalism.

Reading §2254(d) in the manner described above does not offend the comity and federalism interests underlying AEDPA or place any undue burden on state courts. For the vast majority of state courts, the effort necessary to produce a reasoned decision is a small price to pay for the benefits promised by §2254(d). State courts willing to trade those benefits for the freedom not to explain their decisions on matters of federal constitutional law, of course, remain free to do so. *Cf.* (*Michael*) *Williams v. Taylor*, 529 US. 420, 443 (2000) ("We do not suggest the State has an obligation to pay for investigation of as yet undeveloped claims; but if the prisoner has made a reasonable effort to discover the claims ..., §2254(e)(2) will not bar him from developing them in federal court").

Furthermore, although §2254(d) is an important part of the post-AEDPA federal habeas scheme, it is not the sole mechanism for safeguarding states' interests in finality, comity and federalism. On the contrary, even where a state court chooses not to describe the reasoning underlying its decision on a federal constitutional claim, a prisoner seeking federal

habeas relief still faces a demanding set of requirements. For example, prisoners remain obligated in all cases to fairly present their constitutional claims to the state courts, *see* 28 U.S.C. §2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), and to make diligent efforts to develop the facts in support of those claims before the state courts, *see* 28 U.S.C. §2254(e)(2); (*Michael*) *Williams v. Taylor*, *supra*. States' interests in the enforcement of their own rules continue to be protected by the procedural default doctrine. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). States' interests in finality likewise continue to be safeguarded by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288, 301 (1989). *See also Horn v. Banks*, 536 U.S. 266, 272 (2002) (*per curiam*) ("in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state"). Additionally, for many constitutional violations, relief remains unavailable absent a finding that the "error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 127 S.Ct. at 2327 ("[I]t is implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice,' with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable. That said, it certainly makes no sense to require formal application of *both*

tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former") (additional internal citations omitted).

In short, a determination that §2254(d) should not be applied where doing so is impracticable would remove only one of a formidable array of barriers to habeas relief. The barriers that remain would provide ample protection to the minority of state courts that choose to reject claims of federal constitutional error without disclosing their reasons for doing so.

CONCLUSION

WHEREFORE, for the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers supports Mirzayance's request that the grant of habeas relief be affirmed, and urges the Court to resolve this case in a manner consistent with prerequisites to application of 28 U.S.C. §2254(d) described in this brief.

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